Supreme C

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IN THE
Supreme Court of the United States
October Term, 1997

LAFAYETTE FEDERAL CREDIT UNION, et al.,
Petitioners,

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.,
Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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June 3, 1998

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QUESTIONS PRESENTED

1. Whether, by virtue of its appointment as conservator of a credit union, the National Credit Union Administration ("NCUA") owns the exclusive right to sue itself for its actions as conservator (in other words, is NCUA both the chicken and the egg?)

2. Whether FIRREA's 10-day window for challenging the appointment of a conservator forever bars Administrative Procedure Act and common law claims against NCUA for unauthorized actions that occur after the window closes?

3. Whether FIRREA's procedure for administrative claims against the liquidation estate of a credit union bars Administrative Procedure Act and common law claims against the NCUA for regulatory conduct that two of three NCUA Board members state was unauthorized?

4. Whether the Fourth Circuit's interpretation of FIRREA in this case renders that statute incompatible with due process?

5. Whether the NCUA violated due process when two out of three NCUA Board members did not authorize the de facto liquidation of CapCorp?

LIST OF PARTIES

Plaintiffs in the district court were 98 federal credit unions that owned Preferred Capital Shares in Capital Corporate Federal Credit Union, a corporate credit union that provided services to member credit unions. Plaintiffs brought individual claims and derivative claims on behalf of CapCorp. Plaintiffs do not have any parent companies or subsidiaries. Ninety-four Plaintiffs are petitioners in this case: Lafayette Federal Credit Union, LIJ Employees Federal Credit Union, Aberdeen Proving Ground Federal Credit Union, Actors Federal Credit Union, Agriculture Federal Credit Union, American Chemical Society Federal Credit Union, Apple Federal Credit Union, Auto Workers Federal Credit Union, Automatic Data Processing Federal Credit Union, BUCS Federal Credit Union, Budget Federal Credit Union, Buffalo Fire Department Federal Credit Union, Bulldog Federal Credit Union, Cedar Point Federal Credit Union, Census Federal Credit Union, Central Credit Union of Maryland, Chesapeake Family Federal Credit Union, Chestnut Run Federal Credit Union, Chief Pontiac Federal Credit Union, CINFED Employees Federal Credit Union, Columbia Federal Credit Union, Comstar Federal Credit Union, Delaware State Police Federal Credit Union, Department of Commerce Federal Credit Union, Department of the Interior Federal Credit Union, Department of Labor Federal Credit Union, Detroit Postal Employees Credit Union, Dexsta Federal Credit Union, Dover Federal Credit Union, Dupont Stine-haskell Employees Federal Credit Union, Eastalco Federal Credit Union, FDIC Employees Federal Credit Union, First American Credit Union, First Atlantic Federal Credit Union, 1st Liberty Federal Credit Union, First Peoples Community Federal Credit Union, Franklin Mint Federal Credit Union, Friendship Federal Credit Union, GEICO Federal Credit Union, Greater New Orleans Federal Credit Union, GSA Federal Credit Union, Hercules Federal Credit Union, HUD Federal Credit Union,

IBM Metro Employees Federal Credit Union, Johns Hopkins Federal Credit Union, Liberty Savings Federal Credit Union, Louviers Federal Credit Union, Matcom Federal Credit Union, MCBR Federal Credit Union, Money One Federal Credit Union, Monocacy Federal Credit Union, MTA Employees Credit Union, Napus Federal Credit Union, NARC Federal Credit Union, NASA Federal Credit Union, National Geographic Society Federal Credit Union, National Science Foundation Federal Credit Union, Nevada Federal Credit Union, Newport Site Employees Federal Credit Union, NLRB Federal Credit Union, North Jersey Federal Credit Union, Nylon Capitol Federal Credit Union, Otero Federal Credit Union, Pannonia Federal Credit Union, Patent & Trademark Office Federal Credit Union, Pensacola Federal Employees #1313 Federal Credit Union, Pentagon Federal Credit Union, Perry Point Federal Credit Union, Prince George's Employees Federal Credit Union, Prince Hall Family Federal Credit Union, R-G Federal Credit Union, Saginaw C.P. Employees Credit Union, St. Joseph Medical Center Federal Credit Union, Santa Rosa County Teachers Federal Credit Union, Satellite Federal Credit Union, Seaboard Employees Credit Union, Silicon Valley Federal Credit Union, Southern Delaware Postal Employees Federal Credit Union, State Employees Federal Credit Union, Sun Country Federal Credit Union, Synergy Federal Credit Union, Teacher Federal Credit Union, TMB Federal Credit Union, Tower Federal Credit Union, Transit Employee's Federal Credit Union, Transportation Federal Credit Union, Treasury Department Federal Credit Union, United States Customs Service Federal Credit Union, United States Postal Service Federal Credit Union, United States Premier Federal Credit Union, United States Senate Federal Credit Union, Veterans Administration Central Federal Credit Union, Washington Gas Light Federal Credit Union, Washington Telephone Federal Credit Union, Woodlawn Autoworkers Federal Credit Union,

Wright Patman Congressional Federal Credit Union, and Marriott Employee's Federal Credit Union.

Defendants below were the National Credit Union Administration ("NCUA"), sued in its corporate capacity and in its capacity as conservator for CapCorp. Because Plaintiffs brought Administrative Procedure Act claims, the United States is also a Defendant.

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Plaintiffs Lafayette Federal Credit Union, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The district court's order granting Defendants' motion to dismiss is reported at 960 F. Supp. 999, and is reprinted in the appendix hereto ("App.") at 4a. The Fourth Circuit's per curiam, unpublished affirmance was reported at 133 F.2d 915, and is reprinted at App. 1a. The Fourth Circuit's order denying Plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at App. 21a.

JURISDICTION

The Fourth Circuit entered its order affirming the district court's dismissal of Plaintiffs' Complaint on January 7, 1998, and denied Plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc on March 6, 1998. 28 U.S.C. § 1254(1) confers jurisdiction on this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The relevant provisions of the Constitution, the Administrative Procedure Act, and the Federal Credit Union Act appear at App. 23a - 30a.

STATEMENT OF THE CASE

Petitioners are 94 federal credit unions who owned Preferred Capital Shares ("PCS") in Capital Corporate Federal Credit Union ("CapCorp"), a credit union that provided services to other credit unions. In 1994, CapCorp earned more than $6.5 million in net income and had assets of $1.5 billion, making

it the fourth largest corporate credit union in America. On January 31, 1995, the National Credit Union Administration ("NCUA") appointed itself as conservator of CapCorp. Ten days later, NCUA staffers began liquidating CapCorp's portfolio of mortgage-backed securities, resulting in the loss of almost all of CapCorp's capital. Having reduced CapCorp to an empty shell, NCUA placed CapCorp into liquidation in April, 1995. All of CapCorp's member-depositors and creditors were paid in full. The PCS holders were last in line to receive the proceeds from the liquidation estate, and suffered all the losses from NCUA's precipitous and unlawful actions. Petitioners collectively lost over $20 million.

Petitioners brought suit, alleging that NCUA staff recommended a sham "conservatorship" of CapCorp to the three-member NCUA Board in January, 1995, with the secret intent of liquidating CapCorp's investment portfolio. The Complaint alleged that NCUA staff waited for a statutory 10-day period to challenge the "conservatorship" in court to expire, then immediately liquidated CapCorp's portfolio, effectively bypassing the requirement of NCUA Board approval for a liquidation.

Petitioners brought common law and Administrative Procedure Act ("APA") claims against the NCUA in its corporate capacity, and in its capacity as conservator of CapCorp. Petitioners also brought due process and takings claims.

After Petitioners filed their Complaint, the House of Representatives' Subcommittee on General Oversight and Investigations of the Committee on Banking and Financial Services reported substantial evidence supporting Petitioners'

core contentions.[1] A memo prepared by the Subcommittee noted that investment analysts hired by NCUA's staff had concluded that CapCorp's portfolio was "marketable, healthy, and plain vanilla. Basically, nothing in the portfolio is distressed."[2]

The Subcommittee Memo reported that two out of three NCUA Board members, Robert Swan and Shirlee Bownee, stated that they were not informed of the NCUA staff's liquidation plans when the Board voted to place CapCorp into conservatorship on January 31, 1995.[3] The minutes of the January 31, 1995 NCUA Board meeting support the contentions of the two Board members.[4] NCUA Board member Bownee said that staff had "acted as if there was no NCUA Board."[5] When NCUA Board member Swan made public comments critical of the CapCorp debacle, NCUA's Executive Director ordered NCUA employees to secretly tape-record

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[1]See letter of January 14, 1997 from Spencer Bachus, Chairman, U.S. House of Representatives Subcommittee on General Oversight and Investigations of the Committee on Banking and Financial Services to The Honorable Norman E. D'Amours, Chairman, National Credit Union Administration, Joint Appendix Below ("J.A.") at 55-59 (hereafter "Bachus letter"), and Memorandum dated January 14, 1997 from General Oversight and Investigations Subcommittee Staff to Chairman Bachus (hereafter "Subcommittee Memo"), J.A. 60-70.

[2]Subcommittee Memo at 23 & n.29, J.A. 64.

[3]Subcommittee Memo at 25-27, J.A. 66-68.

[4]Subcommittee Memo at 27-29, J.A. 68-70.

[5]Subcommittee Memo at 26, J.A. 67.

statements by Swan and denied Swan access to NCUA documents related to CapCorp.[6]

The district court had jurisdiction under the Federal Credit Union Act, which provides that NCUA may sue and be sued, 12 U.S.C. § 1789(a)(2); the Administrative Procedure Act, 5 U.S.C. § 702, et seq.; 28 U.S.C. § 1331; and 28 U.S.C. § 1391(e).

The district court acknowledged that the Complaint described "many acts of misfeasance and malfeasance on the part of the Defendants which would certainly preserve [Plaintiffs'] case at this juncture were this case properly considered under the APA." 960 F. Supp. at 1004, App. 14a. Nevertheless, the district court granted NCUA's motion to dismiss on three grounds. The district court held that because NCUA had succeeded to all of CapCorp's rights when it appointed itself conservator, NCUA had the exclusive right to bring a derivative suit for harms to CapCorp--even where NCUA itself was the wrongdoer to be sued. In sum, the district court held that only NCUA could sue itself. 960 F. Supp. at 1005, App. 18a.

The district court also held that because the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") provided a 10-day window for challenging the appointment of a conservator in district court, CapCorp had forever lost the right to challenge the actions of the NCUA as conservator when the 10-day window closed. 960 F. Supp. at 1005, App. 17a. The district court's opinion never explained how Petitioners or CapCorp could have known in the first 10 days that the "conservatorship" was a sham, and that NCUA

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[6]Bachus letter at 2-3, J.A. 61-62.

intended to liquidate CapCorp's portfolio. Nor did the district court explain why the 10-day window for legal challenges should forever immunize NCUA for actions taken after the window closed.

The district court also held that it lacked jurisdiction because Petitioners had not exhausted the administrative claims process under 12 U.S.C. 1787(b) applicable to claims against the assets of a credit union in liquidation. The court erroneously asserted that there was no meaningful difference between NCUA-Corporate and NCUA as conservator and liquidator of CapCorp, and thus any claim against NCUA was a claim against CapCorp triggering the exhaustion requirement. 960 F. Supp. at 1004, App. 11a - 16a.

The district court held that heavily-regulated financial institutions had a diminished expectation that the government would not seize their assets, and thus it was not a taking or a violation of due process to close an insolvent credit union. The court made no finding that CapCorp was ever insolvent. 960 F. Supp. at 1005, App. 18a.

In a lawsuit involving a gross abuse of regulatory power where the Plaintiffs collectively lost over $20 million, the Fourth Circuit affirmed "on the reasoning of the district court" in an unpublished, per curiam opinion.

REASONS FOR GRANTING THE WRIT

The district court's decision conflicted with precedents of this Court, decisions of the Third, Fifth, and Tenth Circuits, and decisions of the Court of Federal Claims. If the district court's opinion and the Fourth Circuit's per curiam affirmance are allowed to stand, banking regulators will have a road map to avoid important statutory protections and eliminate effective

judicial review. FIRREA contemplates having the politically-appointed boards that oversee banking agencies decide whether conservatorships or liquidations of troubled financial institutions are appropriate. However, if regulatory staffs need only get approval for a "conservatorship" before carrying out de facto liquidations, that is all they will do. And if, as the district court held, shareholders are forever precluded from seeking judicial review of regulatory actions taken more than 10 days after a conservatorship is imposed, all banking regulators will do what the NCUA did here--impose a conservatorship, wait 10 days, and then claim immunity from judicial review no matter what harms they wreak.

I. FIRREA DOES NOT GRANT NCUA THE EXCLUSIVE RIGHT TO SUE ITSELF AFTER IT BECOMES CONSERVATOR OF A CREDIT UNION.

The district court held that because the NCUA as conservator took over "all rights, titles, powers, and privileges" of CapCorp, 12 U.S.C. 1787(b)(2)(B)(1), only NCUA had standing to sue itself for any wrongs done to CapCorp. 960 F. Supp. at 1005, App. 17a. FIRREA's grant of conservatorship powers falls far short of repealing the waiver of NCUA's sovereign immunity in 12 U.S.C. §1789(a)(2). It also falls short of abrogating the ordinary relationships between stockholders and a corporate receiver.

A 1936 case from this Court established that government receivers do not own the exclusive rights to sue themselves. In United States Shipping Board Merchant Fleet Corp. v. Rhodes, 297 U.S. 383 (1936), the Comptroller of the Currency had appointed a receiver for a bank in Washington, D.C. that had substantial federal government funds on deposit. The receiver had paid the government the full value of its deposits, and paid other depositors 50 cents on the dollar. One of the non-

government depositors brought a derivative action on behalf of the bank, alleging that the payments to the government had been illegal. The D.C. Circuit recognized what NCUA argued in this case: "[t]he receiver, in applying the machinery of liquidation, becomes to all intents and purposes the bank." O'Connor v. Rhodes, 79 F.2d 146, 148 (D.C. Cir. 1935). Nonetheless, because the receiver had been appointed by the Comptroller of the Currency, and had paid the government deposits at the direction of the Comptroller, the D.C. Circuit held that the depositor had the right to bring a derivative action. The D.C. Circuit also held that a demand on the receiver would be futile. This Court affirmed.

The Court of Claims squarely rejected the argument that FIRREA grants federal agencies the exclusive right to sue themselves for their actions as conservators or liquidators. As the Court of Claims wrote: "[t]he government fails to appreciate the disingenuousness of this position. It is a little like the fox arguing that it is in a better position to know the chickens' interests than the chickens." Suess v. United States, 33 Fed.Cl. 89, 97 (1995).

This criticism is well-deserved, for if this were the law, it would surely be a denial of due process to place a defendant in possession and control of a plaintiff's claims against it. Such a conflict of interest is fundamentally unfair.

II. THE 10-DAY PERIOD TO CHALLENGE THE APPOINTMENT OF A CONSERVATOR DOES NOT APPLY TO CLAIMS ARISING FROM NCUA'S CONDUCT AFTER THE 10-DAY PERIOD, AND DOES NOT BAR CLAIMS BROUGHT AFTER THE CONSERVATORSHIP IS OVER.

The district court rejected Petitioners' common law and APA claims on the grounds that they were derivative of rights belonging to CapCorp, and that by not challenging the appointment of a conservator within 10 days, CapCorp lost any rights to challenge the conservatorship later.[7] The district court relied on 12 U.S.C. §1786(h)(3), which states in relevant part:

> Not later than ten days after the date on which the Board takes possession and control of the business and assets of an insured credit union pursuant to [the conservatorship provision], such insured credit union may apply to the United States district court . . . for an order requiring the Board to show cause why it should not be enjoined from continuing such possession and control. Except as provided in this paragraph, no court may take any action, except at the request of the Board by regulation or order, to restrain or affect the exercise of powers or functions of the Board as conservator.

The district court's holding conflicts with the plain language of section 1786(h)(3), and conflicts with a decision of the Tenth

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[7]The district court's opinion went beyond what NCUA argued in its Motion to Dismiss. NCUA's Motion to Dismiss argued that this 10-day window barred only Counts V and VI of the Complaint, which alleged that NCUA acted unlawfully and arbitrarily in appointing itself conservator. Memorandum in Support of Defendants' Motion to Dismiss, February 10, 1997, at 21-22.

Circuit. NCUA terminated the conservatorship of CapCorp in April, 1995. The conservatorship is over. This lawsuit did not ask the courts to "take any action . . . to restrain or affect the exercise of powers or functions of the Board as conservator," because the Board was no longer functioning as conservator.

As the Tenth Circuit held in Franklin Savings Association v. Office of Thrift Supervision, 35 F.3rd 1466, 1472 & n.7 (10th Cir. 1994), "post-action suits do not affect or restrain the exercise of powers or actions of the agency actors." The Tenth Circuit wrote:

> Our comfort in upholding FIRREA's denial of judicial review of the replacement [of a conservator with a receiver] comes from the possible availability of redress if the Resolution Trust Corporation mismanages a liquidation or improperly liquidates a savings and loan. See Abbott Bld. Corp. v. United States, 951 F.2d 191, 195 (9th Cir. 1991)(courts have authority to hear a suit alleging governmental banking agency as receiver violated state law). The Administrative Procedure Act protects from agency action that is arbitrary and capricious or in bad faith. 5 U.S.C. sections 500-706.

35 F.3rd at 1472.

Whether or not the 10-day review provision might apply to the fraudulent appointment of a conservator in the first place, it certainly does not apply to unlawful and ultra vires acts committed by the conservator after the 10-day window had closed. Many such acts are alleged in this case, and the district court conceded the sufficiency of these allegations under the APA. 960 F. Supp. at 1004, App. 14a. Thus, even assuming the initial appointment may only be challenged within 10 days, Petitioners' additional claims regarding post-appointment

illegality by NCUA-Conservator or by NCUA-Corporate are unaffected by that provision.

Finally, the core allegation in this case is that NCUA staff concealed their intent to liquidate CapCorp's portfolio from the NCUA Board when they recommended a "conservatorship" to the Board in January, 1995. There is no way that CapCorp or Petitioners could have learned the essential facts supporting that claim within 10 days. Absent knowledge of this wrongdoing by NCUA staff and knowledge of the staff's intent to misuse the conservatorship, any initial challenge brought within 10 days could not have raised the claims asserted here. Petitioners contend that section 1786(h)(3) does not apply to, or bar, claims of this type. And to the extent that this Court finds that claims of agency illegality which were unknown and unknowable in the first 10 days are forever barred by the statute, then Petitioners contend that the statute, as so interpreted, violates due process.

III. FIRREA'S ADMINISTRATIVE CLAIMS SCHEME FOR CREDITORS OF A LIQUIDATED CREDIT UNION DOES NOT APPLY TO SHAREHOLDER CLAIMS AGAINST THE NCUA.

The Federal Credit Union Act provides for an administrative process to resolve claims by creditors on the assets of a credit union in liquidation. See 12 U.S.C. 1787(b). The Act also contains a limitation on judicial review, 12 U.S.C. 1787(b)(13)(D), which states:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over-

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any credit union for which the Board has been appointed liquidating agent, including assets which the Board may acquire from itself as such liquidating agent; or

(ii) any claim relating to any act or omission of such credit union or the Board as liquidating agent.

The district court held that this provision barred Petitioners' claims against the NCUA. That holding violates the plain meaning of the statute and conflicts with numerous decisions from other circuits.

The plain terms of the statute state that the jurisdictional bar applies only to claims seeking "payment from . . . the assets of any credit union" in liquidation and claims seeking a "determination of rights with respect to . . . the assets of any credit union" in liquidation. But Petitioners seek neither "payment from" nor a "determination of rights with respect to" the assets of CapCorp. Instead, Petitioners seek equitable relief from NCUA-Corporate-- i.e., NCUA acting in its capacity as regulator and insurer. Likewise, Petitioners raise claims "relating to" acts and omissions of the NCUA as conservator and as regulator, but not against CapCorp or NCUA as "liquidating agent."

The Fourth Circuit's affirmance of the district court's opinion has created a significant conflict in the Circuit Court of Appeals. The Fifth Circuit has recognized that the anti-injunction provisions of FIRREA do not apply to claims against regulatory agencies in their corporate capacities. In Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545, 547 (5th Cir. 1993), the Fifth Circuit held that notwithstanding the anti-

injunction provision of 12 U.S.C. 1821(j), the "district court had jurisdiction to enjoin the FDIC because the FDIC was acting in its corporate capacity." See also, Maryland Nat'l Bank v. RTC, 895 F. Supp. 762, 773 (D. Md. 1995) (administrative claims procedures of [12 U.S.C. section] 1821(d) apply only to claims against the failed depository institution," and not to a claim against RTC for fraud committed while litigating a case as conservator); cf. RTC v. CedarMinn Bldg. Ltd. Partnership, 956 F.2d 1446 (8th Cir.), cert. denied, 506 U.S. 830 (1992) ("We refuse to adopt . . . a cavalier attitude about the distinction in roles between conservator and receiver. . . . This distinction was not only specifically recognized in FIRREA, it was emphasized in the Conference Report"); Limehouse v. RTC, 862 F. Supp. 97, 105 (D.S.C. 1994) (RTC "in its corporate capacity is a discrete legal entity from RTC in either of its capacities as receiver or conservator.")

The banking regulatory agencies themselves have asserted the distinctions between their corporate capacities and their capacities as conservators or receivers of financial institutions. In Rosa v. RTC, 938 F.2d 383 (3d Cir.), cert. denied, 502 U.S. 981 (1991) the Third Circuit noted that "RTC concedes that plaintiffs' claims asserted against it in its corporate capacity are not subject to the jurisdictional bar" of the administrative claims process, 12 U.S.C. §1821(d)(13)(D). 938 F.2d at 392.[8]

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[8]The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") created nearly identical statutory schemes for conservatorships of banks, savings and loans, and credit unions. Most cases addressing these FIRREA provisions have involved actions by the RTC or the Federal Deposit Insurance Corporation ("FDIC"). Because of the nearly identical statutory provisions involved, all parties and the district court treated such cases as precedential. See 960 F. Supp. at 1003 & n.6, App. 11a - 12a.

Like the petitioners in United States v. Winstar Corp., 116 S.Ct. 2432 (1996), Petitioners here do not seek payment from the receivership estate of a financial institution. As in Winstar, Petitioners here seek relief directly from a regulatory agency. Petitioners are not bringing a claim against CapCorp's estate; they do not seek to reduce CapCorp's assets by one dime. Instead, they seek a judgment requiring NCUA to return assets to CapCorp's estate. Just as in the Winstar cases, the administrative claims procedure for adjudicating claims against the liquidation estate has no application to claims brought directly against regulatory agencies. Yet under the Fourth Circuit's reasoning in this case, FIRREA's administrative claims procedures would have barred relief for the Winstar plaintiffs.

The claims in this case do not seek a determination of rights with respect to the assets of CapCorp. Petitioners' rights in that regard are not, and never have been, disputed. As preferred capital shareholders, Petitioners are essentially the final remaindermen of CapCorp's assets. After all creditors have been paid, all expenses accounted for, and all members (depositors) given their deposits, Petitioners get whatever is left. Their final payment depends entirely upon the magnitude of CapCorp's assets, but their rights with respect to any remaining assets are not in issue. Any benefits received by the Petitioners in this case will be the result of an increase in CapCorp's assets, and will have nothing to do with changing the rights of Petitioners vis-a-vis CapCorp. Indeed, all Petitioners are doing in their derivative capacity is collecting for CapCorp an asset -- a chose in action against NCUA -- that NCUA-Liquidator will never collect on its own. NCUA has never challenged Petitioners' rights to the remainder of CapCorp's estate, and NCUA has already paid Petitioners from the depleted remainder of CapCorp's assets. That such payments have been made wholly outside the administrative claims process shows that the distribution of the remainder of the

estate does not involve any disputed claims, and needs no adjudicating.

IV. NCUA VIOLATED DUE PROCESS ON THE FACTS OF THIS CASE BECAUSE THE NCUA BOARD DID NOT AUTHORIZE THE LIQUIDATION OF CAPCORP'S SECURITIES, AND NCUA THUS DID NOT PROVIDE THE PROCESS MANDATED BY THE FEDERAL CREDIT UNION ACT.

In order to justify summary deprivation of property without a pre-deprivation hearing, due process requires procedures "specific enough to control governmental action and reduce the risk of erroneous deprivation." Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. at 301. The Federal Credit Union Act provides specific procedures that NCUA must follow in conducting a conservatorship. 12 U.S.C. 1786(h)(1) provides that the NCUA Board may appoint itself conservator of a credit union. Section 1786(h)(8) states that the conservator shall have the authority to operate the credit union and "conserve its assets to the extent authorized by the Board." (Emphasis added). 12 U.S.C. 1787(b)(2)(J) provides that the as conservator, NCUA may take any action "which the Board determines is in the best interests of the credit union, its account holders, or the Board." (Emphasis added). The core of Plaintiffs' lawsuit is the contention that NCUA did not follow these required procedures, because the NCUA Board did not authorize the manner in which NCUA staff "conserved" CapCorp's assets.

Because NCUA did not follow the procedures controlling its exercise of the extraordinary powers to conduct a conservatorship of CapCorp, NCUA deprived Plaintiffs of their

property without due process. See Detweiler v. Commonwealth of Virginia Department of Rehabilitative Services, 705 F.2d 557, 561 (4th Cir. 1983): "[a]n agency is required to comply with its regulations that are congruent with the requirements of constitutional due process," citing United States v. Caceres, 440 U.S. 741, 749 (1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LAFAYETTE FEDERAL CREDIT UNION, et al. *Plaintiffs-Appellants,*	)
DEXSTA FEDERAL CREDIT UNION, et al. *Plaintiffs,*	)
v.	) No. 97-1837
NATIONAL CREDIT UNION ADMINISTRATION, et al. *Defendants-Appellees.*	)

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, District Judge.
(CA-96-1685-A, CA-96-141-A)

Argued: December 5, 1997

Decided: January 7, 1998

Before MURNAGHAN, HAMILTON, and MICHAEL,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Christopher Bowmar Mead, LONDON & MEAD, Washington, D.C., for Appellants, Thomas Mark Bondy, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. ON BRIEF: Mark London, LONDON & MEAD, Washington, D.C. for Appellants, Frank W. Hunger, Assistant Attorney General, Helen F. Fahey, United States Attorney, Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Steven W. Widerman, Trial Attorney, NATIONAL CREDIT UNION ADMINISTRATION, Alexandria, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

This case arises from the operation and liquidation of Capital Corporate Federal Credit Union ("CapCorp") by the National Credit Union Administration ("NCUA"), the defendant-appellee. NCUA put CapCorp into conservatorship on January 31, 1995, because, among other things, NCUA believed that CapCorp was significantly overinvested in Collateralized Mortgage Obligations. CapCorp's board was notified that day of its right to seek judicial review within ten days, but no judicial or administrative remedy was sought. Pursuant to 12 U.S.C. § 1786(h)(4), NCUA proceeded to

liquidate virtually all of CapCorp's holdings. NCUA appointed itself liquidating agent for CapCorp on April 12, 1995.

The plaintiffs (now the appellants) are ninety-four credit unions who were shareholders in CapCorp, an intermediate credit union. The plaintiffs sued NCUA after the liquidation, alleging that the agency acted beyond its powers in liquidating CapCorp's portfolio, causing them substantial losses. The district court granted summary judgment for NCUA. The court held that the plaintiffs were not barred by the anti-injunction provision of FIRREA,. *see* § 1787(g), because they alleged that NCUA exceeded its statutory powers. However, the court found that CapCorp did not seek judicial review of the conservatorship within ten days as required by FIRREA, *see* § 1786(h)(3), and held that the plaintiffs failed to exhaust their administrative remedies within the ninety-day period mandated by the Act, *see* § 1787(b)(13)(D)(i). Further, the district court held that the plaintiffs' due process rights were not violated because CapCorp itself had standing to challenge the liquidation and the plaintiffs had substantial representation on CapCorp's board at the time. The plaintiffs appeal, and we affirm on the reasoning of the district court. *See Lafayette Federal Credit Union v. National Credit Union Administration*, 960 F.Supp. 999 (E.D. Va. 1997).

AFFIRMED

APPENDIX B

960 F. Supp. 999 printed in FULL format.

LAFAYETTE FEDERAL CREDIT UNION, et al., Plaintiffs, v. NATIONAL CREDIT UNION ADMIN., et al., Defendants.

Civ. No. 96-1685-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

960 F. Supp. 999; 1997 U.S. Dist. LEXIS 5222

April 16, 1997, Decided
April 16, 1997, Filed

DISPOSITION: Defendants' Motion to Dismiss GRANTED.

COUNSEL: Counsel for Plaintiffs: Christopher B. Mead, London & Mead, Washington, DC.

Counsel for Defendants: Richard Parker, Esquire, Assistant US Attorney, Alexandria, Virginia.

JUDGES: James C. Cacheris, UNITED STATES DISTRICT JUDGE

OPINION BY: James C. Cacheris

OPINION: [*1000] MEMORANDUM OPINION

This matter comes before the Court on Defendants' Motion to Dismiss. For the reasons set forth below, Defendants' Motion is GRANTED.

Facts.

Plaintiffs are ninety-six credit unions and former holders of Preferred Capital Shares ("PCS") in now-defunct Capital Corporate Credit Union ("CapCorp").[1] CapCorp was a credit union that provided financial services only to other credit unions; it held no deposits (or shares) of individuals. Defendants are the federal agency charged with regulating credit unions and the arm of that agency appointed as conservator and liquidating agent of CapCorp. This suit arises out of Defendants' decisions to place CapCorp into conservatorship on January 31, 1995 and subsequently to liquidate CapCorp.[2] Plaintiffs claim that these actions cost them $20 million.

Specifically, Plaintiffs allege that in late 1994, the National Credit Union Association ("NCUA") concluded that: (1) Collateralized Mortgage Obligations ("CMOs"), which comprised a substantial portion of CapCorp's portfolio, were risky investments; (2) CapCorp's CMO-laden portfolio threatened CapCorp's liquidity; (3) CapCorp should be liquidated; (4) priority should be given to uninsured depositors rather than to PCS holders in divvying-up liquidated assets; and

---

[1]Unlike standard shareholders, CapCorp's PCS holders could redeem their shares only after giving CapCorp one year's prior notice. Pl's. Compl. at 22 ¶ 11.

[2]Neither Plaintiffs nor CapCorp has filed an administrative challenge to these decisions. Tr. of March 28, 1997 Hearing on this Motion, at 8.

(5) deposits should be frozen for 60 days. Plaintiffs contend that all of these conclusions were not supported by the information available to the NCUA and were contrary to fact.

In addition, Plaintiffs claim that the NCUA's January 31, 1995 order placing CapCorp into conservatorship was based on four reasons: (1) CapCorp was insolvent; (2) there might be a run on shares when the 60-day deposit freeze expired; (3) CapCorp had exceeded its legal borrowing limit; and (4) CapCorp's CMO portfolio was risky. Plaintiffs claim that these reasons were

> erroneous, unlawful, arbitrary, and capricious, [were] based on inaccurate and incomplete information provided by NCUA staff, and [were] motivated by improper factors that NCUA should not have considered, including but not limited to an erroneous conclusion that CMOs were risky investments, that PCS holders were [somewhat culpable for] chasing yield, and that CapCorp's field of membership was too large.

Pl. Compl. at 25. ¶ 21. Moreover, Plaintiffs allege that the NCUA failed to follow Generally Accepted Accounting Practices and its own regulations in determining the value of CapCorp, id. at ¶ 22, and that information was withheld from NCUA board members, denying them the ability to make fully informed decisions. Id. at 26 ¶ 26. Finally, Plaintiffs assert that NCUA officials acted outside their regulatory and statutory authority in liquidating CapCorp, and that these officials are now seeking to cover-up their role in hiding pertinent facts from NCUA Board members. Id. at 27-28 ¶¶ 28, 30.

Plaintiffs bring this ten-count suit both in their own right and on behalf of CapCorp, alleging that Defendants acted illegally, arbitrarily, and capriciously in deciding to place CapCorp into conservatorship and to then liquidate it (Counts V-X) and that Defendants took Plaintiffs' property without due process of law (Count IV). Plaintiffs seek an equitable accounting (Count I), detinue (Count II), and restitution (Count III).[3]

Defendants now seek to dismiss the Complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendants assert that: (1) Plaintiffs lack standing to bring this action directly; (2) only NCUA, and not Plaintiffs, may bring this action on behalf of CapCorp; (3) this Court lacks jurisdiction over Counts I-IV and VII-X because Plaintiffs have failed to meet the exhaustion requirements of the Financial Institution Reform, Recovery, and Enforcement Act ("FIRREA") and, at any rate, FIRREA bars injunctive relief; (4) this Court lacks jurisdiction over Counts V and VI because the Federal Credit Union Act requires that such claims be brought within ten days of the commencement of the conservatorship; and (5) Counts IV, VII and IX fail to state a claim upon which relief may be granted.

Standard of Review

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[3]One of the Plaintiffs, Marriott Employee's Federal Credit Union, apparently demanded in an October 8, 1996 letter that the NCUA bring suit under one of these causes of action. Plaintiffs allege that the NCUA has taken no action regarding such a suit, and further allege that Plaintiffs "view as futile any further efforts to persuade the NCUA to pursue legal actions directly on behalf of CapCorp." Pl's. Compl. at 21 ¶ 5.

"The burden of proving subject matter jurisdiction on a [Fed.R.Civ.P. 12(b)(1)] motion to dismiss is on the plaintiff, the party asserting jurisdiction." Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

A Rule 12(b)(6) motion tests the legal sufficiency of a complaint. Randall v. U.S., 30 F.3d 518, 522 (4th Cir. 1994) cert. denied, 115 S. Ct. 1956 (1995). Accordingly, such motions "should be granted only in very limited circumstances." Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). When considering a motion to dismiss, the plaintiff's allegations must be taken as true. Revenue v. Charles County Comm'rs, 882 F.2d 870, 873 (4th Cir. 1989). Therefore, a motion to dismiss under Rule 12(b)(6) should be denied "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" De Sole v. U.S., 947 F.2d 1169, 1177 (4th Cir. 1991) (quoting Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456, 457 (4th Cir. 1983)).

Analysis.

As a threshold issue, the United States, as sovereign, enjoys immunity from suit unless it waives that immunity. In general, the Administrative Procedures Act ("APA"), codified at 5 U.S.C. § 702, et seq., waives sovereign immunity for actions of the federal government. However, "[t]he APA excludes from its waiver of sovereign immunity (1) claims for money damages, (2) claims for which an adequate remedy is available elsewhere, and (3) claims seeking relief expressly or impliedly forbidden by another statute." Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 607-08 (D.C. Cir. 1992). Thus, if FIRREA forbids suit, the Plaintiffs' claims fail. Understandably, Plaintiffs argue that FIRREA's "sue and be sued" clause is a "broad waiver" of sovereign immunity.

Tr. at 3;[4] see also Transohio, 967 F.2d at 606 (in dicta) (citing similar language in 12 U.S.C § 1819).

The Court's analysis of FIRREA begins with the text of the statute itself. United States v. Lund, 853 F.2d 242, 245 (4th Cir. 1988). "As the Supreme Court has repeatedly recognized, when the terms of a statute are unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." Id. (quotations and citations omitted) (cataloguing cases). Section 1787 of FIRREA reads in pertinent part:

> (b) Powers and duties of Board as conservator or liquidating agent. . . .
>
> (2) General powers
>
> (A) Successor to credit union
> The Board shall, as conservator or liquidating agent, and by operation of law, succeed to–
>
> (i) all rights, titles, powers, and privileges of the credit union, and of any member, accountholder, officer, or director of such credit union with respect to the credit union and the assets of the credit union;. . .

---

[4]See 12 U.S.C. § 1789(a)(2):
(a) In carrying out the purposes of this subchapter, the Board may--

* * *

(2) sue and be sued, complain and defend, in any court of law or equity, State or Federal. . . .

(B) Operate the credit union

The Board may, as conservator or liquidating agent-

(i) Take over the assets of and operate the credit union with all the powers of the members or shareholders, the directors, and the officers of the credit union and shall be authorized to conduct all business of the credit union; . . .

* * *

(13) Additional rights and duties . . .

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over–

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any credit union for which the Board has been appointed liquidating agent, including assets which the Board may acquire from itself as such liquidating agent; or

(ii) any claim relating to any act or omission of such credit union or the Board as liquidating agent.

* * *

(g) Limitation on court action

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or effect the exercise of powers or functions of the Board as a conservator or a liquidating agent.

A. Plaintiffs' failure to exhaust the administrative remedies established by FIRREA deprives this Court of subject matter jurisdiction.

The Court is guided by the plain meaning of the statute's text, as far as one is discernable. Nonetheless, it is helpful to recall the history of the Act as a backdrop to the Court's decision. In the wake of the savings and loan crisis of the late 1980s, "Congress enacted FIRREA, Pub. L. No. 101-73, 103 Stat. 183, §§ 101-1404, to establish a comprehensive scheme for efficiently administering all claims resulting from failed [financial institutions]." Brady Dev. Co., Inc. v. Resolution Trust Corp., 14 F.3d 998, 1002-03 (4th Cir. 1994).[5]

Accordingly,

> [t]o effectuate its goals of managing claims in an expeditious manner through an administrative process, Congress placed jurisdictional limits on the power of federal courts to review matters involving failed [institutions] under FIRREA.

---

[5]In Brady, the Fourth Circuit held that plaintiffs in a pre-receivership suit must avail themselves of FIRREA's administrative procedures after the RTC is subsequently appointed as receiver of the defendant institution. Because the Brady plaintiffs failed to do so, the district court lacked subject matter jurisdiction.

> Congress sought to ensure that all claims undergo the administrative claims process and are under the exclusive control of the [executive branch].

Id. at 1003 (interpreting 12 U.S.C. § 1821(d)(13), which is directly analogous to § 1787(b)(13)(D)).[6] In the context of Brady, this meant that plaintiffs, had they submitted their claims to the RTC process and been dissatisfied with the outcome, could have continued those claims in district court after concluding the administrative process. Id.

Plaintiffs here argue that they should be allowed to raise their claims for the first time now, since the administrative processes have run their course and CapCorp has been liquidated. However, this would clearly run counter to the Fourth Circuit's holding that "Congress sought to ensure that all claims undergo the administrative claims process." Id. (emphasis added).[7]

Plaintiffs contend that "claims" refers only to creditors of CapCorp, and that Plaintiffs, claiming to be creditors of the

---

[6]The Fourth Circuit has never interpreted FIRREA's anti-injunction clause or jurisdictional bar in a case involving a credit union. However, where FIRREA uses identical language regarding banks, savings and loans, and credit unions, the Court will follow the Fourth Circuit's interpretation of that language.

[7]Brady further held that "FIRREA's legislative history also buttresses the position that a creditor must avail himself of the administrative process first." Id. at 1005 n.1 (citing The House Banking, Finance and Urban Affairs Committee Report on FIRREA, H.R.Rep. No. 101-54(I), 101st Cong., 1st Sess. 418, reprinted in U.S.C.C.A.N. 86, 214).

NCUA, are not bound by the administrative procedures.[8] However, Plaintiffs fail to explain adequately how treating them differently than other creditors serves Congress's interest in "expeditiously and fairly" adjudicating claims involving failed financial institutions under FIRREA.[9] In Tillman v. Resolution Trust Corp., the Fourth Circuit held that "Congress required persons making claims against a failed financial institution or seeking to adjudicate rights against them to present their claims first to the receiver for resolution." 37 F.3d 1032, 1035 (4th

---

[8]The Fourth Circuit has defined what comprises a claim under FIRREA:

> [A]lthough Elmco's complaint technically requested declaratory judgment that it owned the funds and an order requiring the RTC to refund them, it was in essence a claim for monetary relief. . . . Accordingly, we have little trouble treating Elmco's facially declaratory and injunctive action as what it genuinely is, i.e., a "claim" against the assets of FSA. Elmco Properties, Inc. v. Second Nat. Fed. Sav. Assoc., 94 F.3d 914, 919 n.1 (4th Cir. 1996) (reversing the district court's denial of subject matter jurisdiction and holding that district court had jurisdiction over plaintiff's due process claim).

This definition clearly encompasses the relief sought here.

[9]The Fourth Circuit has once before dismissed an attempt to draw a similar distinction in a FIRREA case:

> Elmco briefly argues that, because [the receiver] never had a right to seize the account, those funds never became FSA's "assets"; from this it concludes that its claim seeking repayment of those funds really does not affect FSA's assets, hence is not subject to FIRREA's jurisdictional bar. This claim is meritless because, even if Elmco's claim to the funds succeeds on the merits, satisfaction of the claim must necessarily be paid out of [the receiver's] assets. Accordingly, Elmco's claim seeks "payment from" FSA's assets and is subject to the jurisdictional bar. Elmco, 94 F.3d at 920 n.4.

Cir. 1994) (emphasis added). This holding further undercuts the differentiation Plaintiff seeks to invoke between creditors and stockholders. Similarly, while Plaintiffs assert that their claim is against the NCUA and not CapCorp, since the NCUA has stepped into CapCorp's shoes, Plaintiffs have highlighted a distinction without illustrating a difference. See Elmco Properties, Inc. v. Second Nat. Fed. Sav. Assoc., 94 F.3d 914, 920 n.4 (4th Cir. 1996).

The Court finds that Congress evinced no intention to differentiate between claimants. Rather, as in Brady,

> permitting this action to go forward would thwart FIRREA's purposes and permit creditors to evade the comprehensive administrative claims procedures envisioned by the statute. . . Judicial review of claims before an administrative review by the RTC would render the administrative scheme established in [FIRREA] meaningless because creditors essentially could opt out of the administrative review.

14 F.3d at 1006. This concern is equally valid regarding shareholder claims.

Plaintiffs assert in detail many acts of misfeasance and malfeasance on the part of the Defendants which would certainly preserve their case at this juncture were this case properly considered under the APA. However, in light of FIRREA's clear language,

> the [C]ourt has no choice in the matter. The administrative prerequisite to suit set forth in the federal statute has been strictly construed and is

> considered an absolute and unwaivable jurisdictional requirement . . . this court has no power to excuse a condition precedent to federal jurisdiction . . . .

Id. at 1007 (quoting Glenborough New Mexico Assoc. v. Resolution Trust Corp., 802 F. Supp. 387, 392-93 (D.N.M. 1992)).[10]

Plaintiffs point out that the Fourth Circuit has ruled that a district court had subject matter jurisdiction over a due process claim brought by a creditor of a failed institution. See Elmco, 94 F.3d 914. However, in Elmco, the plaintiff never received adequate notice of the agency takeover, and thus had

---

[10] Accord Elmco, 94 F.3d at 919 ("[FIRREA's] provisions combine to create an exhaustion requirement that. . .is 'absolute and unwaivable.'") (quoting Brady, 14 F.3d at 1007). But see James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1092 (D.C. Cir. 1996) ("[Where the statute is silent,] we assume . . . that the Administrative Procedures Act authorizes federal district courts to review the appointment [of FDIC as receiver for a national bank], unless another statute specifically precludes review of the action or the action is committed by law to agency discretion.") (citing Abbott Labs v. Gardner, 387 U.S. 136, 140 (1967); 5 U.S.C. § 701(a) (1994)). The James Madison court ultimately affirmed the district court's grant of summary judgment in favor of the government and admitted that the court's own reading of FIRREA was difficult to reconcile with the intent of Congress. See id. at 1093.

In another recent case, the Fourth Circuit has pointed out that FIRREA grants regulators "extraordinary" and "exceptionally broad" powers. See Landmark Land Co. of Okla., Inc. v. Resolution Trust Corp., 973 F.2d 283, 288 (4th Cir. 1992). In Landmark, the Fourth Circuit held that, although the bank's subsidiaries' Temporary Restraining Order ("T.R.O.") to prevent the bank from electing a new board was handed down two days before the RTC was appointed receiver of the bank, the T.R.O. was rendered invalid by FIRREA's anti-injunction clause and the subsequent appointment of the RTC.

been unable to avail itself of FIRREA's administrative remedies. Furthermore, the remedy ultimately ordered by the Fourth Circuit in Elmco was to vacate the district court's order holding that it lacked jurisdiction and to remand the case, not for determination before the district court, but back to the RTC for resolution via FIRREA's administrative regime. Id. at 922. That remedy is not sought here.[11]

Accordingly, this Court lacks jurisdiction over Plaintiffs' claims because Plaintiffs have failed to meet the exhaustion requirements of FIRREA.[12]

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[11]Citing Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985), which held that the detailed administrative remedies available in the Civil Service Reform Act barred judicial consideration of federal employee personnel grievances, Defendants argue that Plaintiffs are barred from seeking a remedy in this Court because FIRREA's comprehensive administrative scheme reveals congressional intent to bar district court jurisdiction. However, in the wake of Supreme Court precedent calling Pinar's holding into question, the Fourth Circuit declined to reaffirm Pinar. See Bryant v. Cheney, 924 F.2d 525 (4th Cir. 1991). Likewise, the Court declines to rely on Pinar in dismissing Plaintiffs' claims.

[12]Defendants also assert that Plaintiffs' claims are barred by FIRREA's anti-injunction clause. However, since Plaintiffs allege that Defendants exceeded their statutory powers, the anti-injunction clause seems not to apply. Interpreting identical language in another FIRREA provision, the Fourth Circuit has held that

> [§ 1821(j)] does not immunize the RTC from all injunctions: By its terms, § 1821(j) shields only "the exercise of powers and functions" Congress gave to the FDIC; the provision does not bar injunctive relief when the FDIC has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions. Elmco, 94 F.3d at 923 (citations omitted); accord James Madison, 82 F.3d at

B. Only NCUA, and not Plaintiffs, may bring this action on behalf of CapCorp.

Plaintiffs' derivative suit is barred for two reasons. First, a derivative suit must assert a right actually possessed by the corporation; there can be no suit if the corporation has somehow has lost that right. Bauer v. Sweeny, 964 F.2d 305, 308 (4th Cir. 1992). Here, CapCorp lost whatever rights it had after the statutory ten-day challenge period ended.[13] Second, under 12 U.S.C. § 1787(b)(2)(B),

> The Board may, as conservator or liquidating agent-
>
> (i) Take over the assets of and operate the credit union with all the powers of the members or shareholders, the directors, and the officers of the credit union and shall be authorized to conduct all business of the credit union; . . .

Absent contrary guidance from the Fourth Circuit, the Court reads this provision to vest in the conservator and liquidating agent the shareholders' former right to bring a derivative suit. Accordingly, Plaintiffs' derivative claims are dismissed.

C. Count IV fails to state a claim upon which relief may be granted.

1093.

[13]Neither the text of FIRREA nor its history support Plaintiffs' assertion at oral argument that the ten-day challenge period is a timing mechanism rather than an absolute jurisdictional bar. See Tr. at 17.

To prove its due process claim, Plaintiffs must of course show that they were deprived of a protected interest without due process of law. See Elmco, 94 F.3d at 920. Plaintiffs claim that Defendants' actions deprived them of their property "interest in a profitable investment portfolio that was liquidated."[14] However, the heavily-regulated nature of the financial services industry and the intrusiveness of federal regulations, including those set forth in FIRREA, diminish a credit union's (and by extension, the credit union's shareholders') expectations that the government will not seize the institution's assets under FIRREA. Since "it is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets," Plaintiffs' due process claim is dismissed. See Branch v. United States, 69 F.3d 1571, 1575 (Fed. Cir. 1995) (citations omitted).

Conclusion.

In sum, Plaintiffs assert a "claim or action for payment from, or . . . seeking a determination of rights with respect to, the assets of a credit union for which the Board has been appointed liquidating agent. . . ." See 12 U.S.C. § 1787(b)(13)(D)(i); accord Elmco, 94 F.3d at 919 n.1. Since neither Plaintiffs nor CapCorp availed themselves of FIRREA's administrative processes, this Court lacks subject matter jurisdiction over their claims. In addition, Plaintiffs have failed to assert a constitutional claim upon which relief may be granted. Finally, and independent of the other grounds for dismissal, Plaintiffs' derivative claims must be dismissed because (1) CapCorp could not assert the claims itself and (2) Defendants have assumed any rights once held by CapCorp's shareholders. Accordingly, Plaintiffs have failed to assert any

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[14]Tr. at 5.

claims upon which relief may be granted and which are properly within the subject matter jurisdiction of this Court. Their claims are therefore DISMISSED.

An appropriate Order shall issue.

Alexandria, Virginia
April 16, 1997

James C. Cacheris
UNITED STATES DISTRICT JUDGE

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby Ordered that:

(1) Defendants' Motion to Dismiss is GRANTED and

(2) The Clerk shall forward copies of this Order to all counsel of record.

And this Order is Final.

Alexandria, Virginia
April 16, 1997

James C. Cacheris
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LAFAYETTE FEDERAL CREDIT UNION, et al.	)	
Plaintiffs-Appellants,	)	FILED
	)	March 6, 1998
DEXSTA FEDERAL CREDIT UNION, et al.	)	
Plaintiffs,	)	
	)	
v.	)	No. 97-1837
	)	CA-96-1685-A
NATIONAL CREDIT UNION ADMINISTRATION, et al.	)	CA-96-141-A
Defendants-Appellees.	)	

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX D

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

Criminal Proceedings and Condemnation of Property

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

Relevant sections of the
Federal Credit Union Act, 12 U.S.C. § 1751, et seq.
(descriptive subheadings not quoted)

12 U.S.C. § 1752a:

> (a) There is hereby established in the executive branch of the Government an independent agency to be known as the National Credit Union Administration. The Administration shall be under the management of a National Credit Union Administration Board.
>
> (b) The Board shall consist of three members, who are broadly representative of the public interest, appointed by the President, by and with the advice and consent of the Senate. In appointing the members of the Board, the President shall designate the Chairman. Not more than two members of the Board shall be members of the same political party.

12 U.S.C. § 1766:

> (b)(1) The Board may suspend or revoke the charter of any Federal credit union, or place the same in involuntary liquidation and appoint a liquidating agent therefore, upon its finding that the organization is bankrupt or insolvent, or has violated any of the provisions of its charter, its bylaws, this chapter, or any regulations issued thereunder.

12 U.S.C. § 1786:

(h)(1) The Board may, ex parte without notice, appoint itself as conservator and immediately take possession and control of the business and assets of any insured credit union in any case in which--

(A) The Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the Fund or the interests of the members of such insured credit union;

. . .

(h)(3) Not later than ten days after the date on which the Board takes possession and control of the business and assets of an insured credit union pursuant to paragraph (1), such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be enjoined from continuing such possession and control. Except as provided in this paragraph, no court may take any action, except at the request of the Board by regulation or order, to restrain or affect the exercise of powers or functions of the Board as conservator.

(h)(4) Except as provided in paragraph (3), in the case of a Federal credit union, the Board

may maintain possession and control of the business and assets of such credit union and may operate such credit union until such time-

(A) as the Board shall permit such credit union to continue business subject to such terms and conditions as may be imposed by the Board; or

(B) as such credit union is liquidated in accordance with the provisions of § 207 [12 U.S.C. § 1787].

12 U.S.C. § 1787:

(a)(1)(A) Upon its finding that a Federal credit union insured under this title is bankrupt or insolvent, the Board shall close such credit union for liquidating and appoint itself liquidating agent therefor.

. . .

(b)(2)(A) The Board shall, as conservator or liquidating agent, and by operation of law, succeed to--

(i) all rights, titles, powers, and privileges of the credit union, and of any member, accountholder, officer, or director of such credit union with respect to the credit union and the assets of the credit union;

. . .

(b)(2)(B) The Board may, as conservator or liquidating agent-

(i) Take over the assets of and operate the credit union with all the powers of the members or shareholders, the directors, and the officers of the credit union and shall be authorized to conduct all business of the credit union;

. . .

(b)(3)(B) The liquidating agent, in any case involving the liquidation or winding up of the affairs of a closed credit union, shall--

(i) promptly publish a notice to the credit union's creditors to present their claims, together with proof, to the liquidating agent by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months respectively, after the publication under clause (i).

(b)(3)(C) The liquidating agent shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the credit union's books--

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the credit union's books within 30 days after the discovery of such name and address.

. . .

(b)(5)(A)(i) Before the end of the 180-day period beginning on the date any claim against a credit union is filed with the Board as liquidating agent, the Board shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

. . .

(b)(5)(C)(i) Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

. . .

(b)(6)(A) Before the end of the 60-day period beginning on the earlier of--

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a credit union for which the Board is liquidating agent; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may . . . file suit on such claim . . . in the district or territorial court of the United States for the district within which the credit union's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(b)(6)(B) If any claimant fails to--

. . .

(ii) file suit on such claim . . .

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the liquidating agent) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

. . .

(b)(13)(D) Except as otherwise provided in this subsection, no court shall have jurisdiction over--

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any credit union for which the Board has been appointed liquidating agent, including assets which the Board may acquire from itself as such liquidating agent; or

(ii) any claim relating to any act or omission of such credit union or the Board as liquidating agent.

. . .

(g) Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or effect the exercise of powers or functions of the Board as a conservator or a liquidating agent.

12 U.S.C. § 1789:

(a) In carrying out the purpose of this title, the Board may--

(i) make contracts;

(ii) sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Board shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy....

APPENDIX F

Administrative Procedures Act

5 U.S.C. § 702:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United Sates: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.